



PUTTING FORWARD COMMON STANDARDS FOR THE MUTUAL RECOGNITION OF FREEZING AND CONFISCATION ORDERS IN THE EU

Policy Brief

Regulation (EU) 2018/1805, a pivotal component of establishing the Area of Freedom, Security, and Justice, serves to streamline the acknowledgement of cross-border freezing and confiscation orders (FCO) within the European Union. Despite aiming to enhance the limited cross-border freezing and confiscation rate, persistent challenges stem from mistrust among Member States. The Regulation strives for automatic recognition while retaining a few conventional mutual legal assistance mechanisms traits. Notably, the principle of automatic recognition is tempered by stipulated grounds for refusal. Although these grounds are circumscribed, they temper the concept of automatic recognition. The varying and often contradictory norms that define the existing national approaches to the implementation of the Regulation, combined with the large number of contradictions and challenges observed in the observed practice, stipulate a clear need for the adoption of a set of **Common Standards and Recommendations (CSR)** to guide practitioners, fostering an effective and equitable Regulation application while safeguarding fundamental rights. These CSR, predicated on necessity, proportionality, minimal refusal grounds, dialogue, and recognition of all FCO types, have garnered validation from practitioners and academics for ongoing enhancement, acknowledging their dynamic nature adaptable to future practices.

Establishing Common Standards

Central to the Regulation's **jurisdiction**, as outlined in Article 1, is the explicit exclusion of FCOs issued on civil or administrative grounds, directing the focus

KEY POINTS

- Trust and cooperation among EU Member States are to be fostered by promoting transparent communication and providing clear guidelines to overcome mutual distrust in the recognition and execution of FCOs.
- A set of Common Standards and Recommendations is to be adopted to ensure a uniform, practical, and rights-respecting approach across the EU, emphasizing necessity, proportionality, and minimal grounds for refusal.
- The scope of "criminal matters" under Regulation (EU) 2018/1805 must be clarified by consistently applying the Engel criteria, ensuring harmonized interpretation across Member States.
- The balance between recognizing non-conviction-based confiscation orders and protecting individuals' rights to property and a fair trial must be maintained, aligning with principles of legality, legitimate purpose, and proportionality.
- Targeted recommendations are to be developed and implemented to enhance the mutual recognition framework for FCOs, including establishing more straightforward communication, leveraging legal instruments, addressing linguistic barriers, and ensuring precise documentation.



squarely on criminal proceedings. The adjudication of what precisely constitutes “proceedings in criminal matters” is not left to arbitrary determination but is instead guided by the Engel criteria—a judicial litmus developed by the Court of Justice of the European Union (CJEU) that assesses the domestic classification of the nature of the offence, and the severity of the penalty to ascertain the criminal nature of a measure. This meticulous application of the Engel criteria ensures a harmonized approach across the Union despite the inherent complexities and nuanced distinctions present within the concept of criminal matters.

Expanding the **scope of criminal matters** to encompass a variety of FCOs, irrespective of the directives encapsulated within Directive 2014/42/EU and including those pertinent to criminal investigations, the Regulation ventures beyond traditional boundaries. This expansion indicates the EU’s commitment to adopting a comprehensive stance on judicial cooperation, broadening the applicability of the Regulation to a broader array of criminal activities.

A salient feature of the Regulation is its emphasis on upholding defendants’ **fair trial** rights. This is particularly evident in the contemplation of non-conviction-based confiscation (NCBC) systems, where the Regulation navigates the delicate balance between endorsing the recognition of NCBC and safeguarding the fundamental right to property and a fair trial. The alignment of NCBC systems with the principles of legality, legitimate purpose, and proportionality, as enshrined in the European Convention on Human Rights (ECHR), underscores the EU’s dedication to ensuring that such measures do not contravene established human rights standards.

Even in instances where the legal framework of the executing state lacks a corresponding mechanism, the Regulation’s approach to the recognition of FCOs is illustrative of the **principle of mutual recognition and trust** that underpins the EU’s judicial cooperation efforts. The Regulation mandates the recognition of FCOs targeting legal entities, further reinforcing its comprehensive approach to combating criminal activities across the EU.

Attaining an Efficient and Effective Framework for Recognition

The efficient and effective implementation of the Regulation is pivotal for the EU’s broader objectives in

combating cross-border crime, necessitating a series of recommendations tailored to enhance the efficacy and efficiency of mutual recognition processes for FCOs. While diverse in their specifics, these recommendations aim to fortify the legal and operational frameworks underpinning the EU’s efforts in this domain.

A fundamental aspect revolves around the need for **clarified and enhanced communication** among authorities within Member States. Given the intricacies of determining the scope of “criminal matters” — a task nuanced by applying the Engel criteria — authorities must engage in proactive communication when uncertainties arise. This matter should be regarded as not merely procedural but foundational in ensuring that the jurisdictional reach of the Regulation is uniformly understood and applied, thereby minimizing discrepancies that could hinder mutual recognition.

The interplay between the Regulation and Directive 2014//42/EU concerning the European Investigation Order highlights an avenue for reinforcing the mutual recognition of FCOs. By leveraging the complementary nature of these instruments, authorities can significantly enhance the **collection and preservation of evidence** across borders. The EIO, designed primarily for evidence acquisition, can be synergistically deployed alongside freezing orders under the Regulation, thereby streamlining judicial processes and maximizing the utility of these tools cohesively. This strategic alignment underscores the potential for shared information facilitated by Annexes I and II, fostering a collaborative environment conducive to the swift execution of freezing orders.

The **designation and validation of competent authorities** within Member States emerge as critical components in this framework. The appointment of central authorities to assist with the administrative tasks related to FCOs, coupled with the facilitative roles of the European Judicial Network (EJN) and Eurojust, underscores the importance of a structured approach to authority designation. This structured approach would ensure that the issuing and execution of FCOs are carried out by entities recognized for their competence, thereby enhancing the Regulation’s operational integrity.

Addressing linguistic challenges constitutes another pivotal area of focus. While promoting inclusivity, the Regulation’s flexibility regarding language use poses practical hurdles in cross-border cooperation. **Adopting English as the working language** for Freezing

and Confiscation Certificates (FCCs), especially in urgent scenarios, would reflect a pragmatic solution to overcoming language barriers. Doing this should be complemented by establishing a centralized list of proficient translators with legal expertise at the EU level, aiming to facilitate clear and effective communication across Member States.

The comprehensive completion of FCCs is a vital step towards ensuring the effective execution of FCOs. Authorities must meticulously complete FCCs, **avoiding common pitfalls such as vague descriptions and incomplete personal data**. This level of precision in the completion of FCCs is essential for the smooth processing of requests, underscoring the importance of clarity and detail in judicial documentation.

The principles of necessity and proportionality are paramount considerations in issuing FCOs. Authorities must conduct cost-benefit analyses to prevent undue burdens, especially concerning minor offences or properties of nominal value. Taking such an approach would not only contribute to streamlining the execution process but also **align the enforcement actions with fundamental rights** considerations, ensuring that the mutual recognition and execution of FCOs are carried out in a manner that respects the principles of justice and equity.

What's Next?

Regulation (EU) 2018/1805 is a cornerstone of the European Union's efforts to establish an Area of Freedom, Security, and Justice. Rooted in the principle of mutual recognition, the Regulation seeks to enhance cross-border cooperation by freezing and confiscating assets linked to criminal proceedings. While aiming for automatic recognition, the Regulation

also incorporates grounds for refusal to ensure the protection of fundamental rights and legal principles. Through careful communication, consultation, and cooperation between Member States, the Regulation strives to balance mutual trust, effective execution of orders, and safeguarding the rights of affected individuals. **The adoption and application of Common Standards and Recommendations have the clear potential to contribute to the harmonization and practical application of the Regulation**, reflecting its dynamic nature and adaptability to future practices.

In synthesizing the diverse elements of the Regulation's standards, it becomes apparent that it is a linchpin in the EU's arsenal against cross-border crime. By codifying the application of the Engel criteria, broadening the scope of criminal matters, emphasizing the protection of fair trial rights, and fostering a culture of mutual recognition, the Regulation (EU) 2018/1805 articulates a vision of judicial cooperation that is both dynamic and deeply rooted in the principles of justice and human rights. Through this intricate legal tapestry, the EU enhances its capacity to combat crime and reinforces its commitment to upholding the rule of law and the fundamental rights of individuals across its Member States.

The recommendations for enhancing the mutual recognition of FCOs within the EU embody a multifaceted approach that addresses legal, procedural, and operational challenges. **By fostering clear communication, leveraging complementary legal instruments, ensuring competent authority designation, overcoming linguistic hurdles, emphasizing precision in documentation, and adhering to principles of necessity and proportionality**, the EU can significantly advance its capabilities in combating cross-border crime through practical judicial cooperation.

FORCE (Freezing Orders and Confiscation orders: Effort for Common Standards) aims at improving judicial cooperation in the recovery of illicit assets by investigating practical obstacles to the implementation of **Regulation (EU) 2018/1805** on the mutual recognition of confiscation and freezing orders. It also seeks to mitigate disparities in training by creating comprehensive resources for legal professionals, policy-makers, scholars and the general public.

FORCE seeks to bridge the gaps between legal systems across the EU by highlighting the existing national provisions and strengthening the mutual cooperation and understanding between practitioners who deal with the practical application of the Regulation.

To achieve this goal, **FORCE** has developed a comprehensive Digital Ecosystem, which incorporates the following modules that could help practitioners in their efforts to ensure that judicial decisions related to the freezing and confiscation of assets derived from criminal activities can be recognized and enforced across all EU Member States more effectively and efficiently than before.



A **Knowledge Sharing Repository**, an interactive map of information regarding freezing and confiscation rules and practices in all EU Member States. For each EU MS a web interface displays the description of the inner freezing and confiscation instruments; links to the relevant legislation and soft law; list of contact points and authorities competent for CFO; useful contacts such as victims' associations, services and organizations dealing with the administration of confiscated properties; and links to national legal persons registers.



A **Virtual Learning Environment** on the Regulation and its implementation, developed to effectively train practitioners and to raise awareness on the existing EU instruments in the field of mutual recognition of freezing and confiscating orders. It hosts an Online Open Course and Case simulations to further assist in the bridging of national discrepancies or lack of training in relation to CFO.



A **FORCE Community**, a digital forum facilitating the information exchange between practitioners and experts, working in the field of freezing and confiscation orders. The registered users can also share opinions and suggestions related to FORCE's products and their efficacy.